89-1084

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PEDRO DASILVA & STEVEN FINN,
Petitioners

v.

THE UNITED STATES OF AMERICA,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DON ERVIN
Counsel of Record

BRIAN WICE
1018 Preston
Seventh Floor
Houston, Texas 77002
(713) 223-1622

Counsel for Petitioner
Pedro DaSilva

JULIANE BALLIRO
BALLIRO, MODANO
& BALLIRO, P.C.
3 Arlington St.
Boston, Massachusetts 02116
(617) 227-5822

Counsel for Petitioner
Steven Finn

Alpha Law Brief Co., Inc. — 8748 Westpark — Houston, Texas 77063 — 789-2000

QUESTION PRESENTED

Whether the Second Circuit Court of Appeals' decision that the Petitioners' mere silence was tantamount to a knowing, voluntary and intelligent waiver of their fundamental right to have a district judge preside over their felony trial is at odds with this Court's decision in *Gomez v. United States,* 109 S.Ct. 2237 (1989).

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OPINION BELOW

United States of America v. Vanwort et al, 887 F.2d 376 (2nd Cir. 1989), the decision of the Second Circuit Court of Appeals affirming the Petitioners' convictions, is reproduced in the Appendix to the Petition for Writ of Certiorari in *Jeanmarie Chapoteau & Michael Crown v. United States of America,* No. _____, filed this date.

The Order of the Second Circuit Court of Appeals denying the Petitioners' Suggestion for Rehearing En Banc is reproduced at Appendix A, *infra.*

JURISDICTION

The Court of Appeals had appellate jurisdiction over the district court's final judgment in this criminal case pursuant to 28 U.S.C. § 1291. The panel's decision was delivered on September 26, 1989. The Petitioners' Suggestion for Rehearing En Banc was timely filed on October 10, 1989, and was denied by the court on December 6, 1989. This petition is being filed within the thirty day extension to December 26, 1989, granted by Mr. Justice Marshall in an order dated November 27, 1989. This Court's jurisdiction in the instant case is based on 28 U.S.C. § 1254.

QUESTION PRESENTED (Restated)

Whether the Second Circuit Court of Appeals' decision that the Petitioners' mere silence was tantamount to a knowing, voluntary and intelligent waiver of their fundamental right to have a district judge preside over their felony trial is at odds with this Court's decision in *Gomez v. United States,* 109 S.Ct. 2237 (1989).

STATUTORY PROVISIONS AT ISSUE

Title 28, United States Code, section 636, provides in pertinent part:

> sec. 636. Jurisdiction, powers, and temporary assignment.
>
> (a) Each United States magistrate serving under

this chapter shall have within the territorial jurisdiction prescribed by his appointment—

* * *

(3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section.

* * *

(b)(3) A magistrate may be assigned such additional duties as are not inconsistent with the Constitution and the laws of the United States.

* * *

(c) Notwithstanding any provision of law to the contrary—

(1) Upon the consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves . . . .

(2) If a magistrate is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of their right to consent to the exercise of such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, neither the district judge nor the magistrate shall attempt to persuade or induce any party to consent to reference of any civil matter to a magistrate. Rules of court for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of the parties' consent.

Title 18, United States Code, section 3401 provides in pertinent part:

> sec. 3401. Misdemeanors; application of probation laws
>
> (a) When specially designated to exercise such jurisdiction by the district court or courts he serves, any United States magistrate shall have jurisdiction to try persons accused of, and sentence persons convicted of, misdemeanors committed within that judicial district.
>
> (b) Any person charged with a misdemeanor may elect, however, to be tried before a judge of the district court for the district in which the offense was committed. The magistrate shall carefully explain to the defendant that he has a right to trial, judgment, and sentencing by a judge of the district court and that he may have a right to trial by jury before a district judge or magistrate. The magistrate shall not proceed to try the case unless the defendant, after such explanation, files a written consent to be tried before the magistrate that specifically waives trial, judgment, and sentencing by a judge of the district court.

STATEMENT OF THE CASE

Petitioner DaSilva was convicted of conspiracy to distribute and possess with intent to distribute cocaine and one substantive count each of importing cocaine and possessing cocaine with intent to distribute in violation of 21 U.S.C. §§ 952(a), 960(a)(1), 960(b)(1), 841(a)(1), 841(b)(A)-(ii)(II), 846 and 18 U.S.C. § 2. He received concurrent sentences of fifteen years imprisonment on the conspiracy, importation counts and possession counts as well as two concurrent five year

special parole terms and a fine of $25,000 for each of the substantive importation and possession counts. DaSilva's fines were ordered to run consecutively and he was also ordered to pay a $150 special assessment.

Petitioner Finn was convicted of one count of conspiracy to distribute and possess with intent to distribute cocaine in violation of 21 U.S.C. §§ 846 and 841(b)(1)(A)(ii)(II). He received a suspended eight year term of imprisonment and was placed on five years probation in addition to being fined $750,000 and ordered to pay a special assessment in the amount of $50.[1]

All proceedings in the district court below were presided over by the Honorable Raymond J. Dearie, United States District Judge for the Eastern District of New York, with the exception of the jury selection process.

During a pre-trial conference held on January 14, 1988, counsel for the petitioners remained silent when informed by Judge Dearie that jury selection would be delegated to the United States Magistrate. While no attorney present, including the Assistant United States Attorney, registered a protest to Judge Dearie's decision, neither did any attorney expressly consent to this procedure.

Judge Dearie did not conduct any further inquiry regarding the delegation of jury selection to the magis-

---

1. The petitioners were ultimately tried with four other co-defendants, two of whom, Jeanmarie Chapoteau, who was convicted of both conspiracy and substantive offenses, and Michael Crown, who was convicted of one substantive offense, present the identical questions raised herein in their joint Petition for Certiorari filed this date. No. _____. *See* page 1, *supra*. All references to the district court proceedings which follow, *infra*, are reproduced in the Appendix to the Petition for Writ of Certiorari in *Chapoteau & Crown v. United States of America, supra*, filed this date.

trate. This record does not reflect any oral or written consent to this procedure by the petitioners or their counsel nor is there any colloquy evidencing that either petitioner DaSilva or Finn was apprised by Judge Dearie that they had a right to have a district judge preside over the jury selection process. On January 19, 1988, United States Magistrate John Caden presided over the jury selection process without any further discussion of or reference to the petitioners' rights to have a district judge conduct the jury selection process.

The petitioners' cases were submitted on briefs and oral argument to a three-judge panel of the Second Circuit Court of Appeals on April 24, 1989. Ironically, that same day, the United States Supreme Court heard oral arguments in *Gomez v. United States,* ____U.S.____, 109 S.Ct. 2237 (1989), a decision eventually handed down on June 12, 1989. *Gomez* reversed the decision of the Second Circuit Court of Appeals in *United States v. Garcia,* 848 F.2d 1324 (2nd Cir. 1988), which had upheld the power of a federal magistrate to conduct jury selection in a felony case.

With leave of the Second Circuit, petitioners DaSilva and Finn joined in a supplemental brief filed by co-appellant Jeanmarie Chapoteau contending that the Supreme Court's decision in *Gomez* compelled a reversal in their cases inasmuch as Judge Dearie had improperly delegated jury selection to a federal magistrate who did not have jurisdiction to preside over this critical stage of the trial. The panel was also apprised of the fact that the Ninth Circuit Court of Appeals had held in *United States v. France,* 886 F.2d 233 (9th Cir. 1989), that the failure to object to the magistrate presiding

over jury selection did not act as a waiver of the defendant's right to a reversal consonant with the Supreme Court's holding in *Gomez*.

On September 26, 1989, the three-judge panel of the Second Circuit affirmed the petitioners' convictions, rejecting, *inter alia*, the contention that the decision in *Gomez* warranted a reversal of the petitioners' convictions. In its cursory disposition of the jury selection issue, the panel relied upon its opinion in *United States v. Wong*, 884 F.2d 1537 (2nd Cir. 1989)[2] and concluded that the failure of the petitioners' counsel to object precluded a reversal of their convictions:

> "In denying Wong's petition for rehearing, we determined that *Gomez* did not require a reversal because Wong had consented to the magistrate's conduct of the voir dire [footnote omitted]. In analyzing *Gomez*, we noted that the Supreme Court "limited its ruling to the situation in which a magistrate selects a jury 'despite the defendant's objection.'" *Wong*, slip op. at 7551 (quoting *Gomez*, 57 U.S. L.W. at 4648). We also observed that in *Gomez*, "[t]he Court introduced its opinion . . . with the statement that '[t]he principal question presented is whether [a magistrate's] presiding at the selection of a jury in a felony trial *without the defendant's consent*' is authorized by the Federal Magistrates Act." *Id.* (emphasis added by *Wong* panel) (quoting *Gomez*, 57 U.S.L.W. at 4643). We denied Wong's petition for rehearing, concluding that because he had not only failed to object but had explicitly consented to the magistrate's selection of the jury, reversal was not required. *Id.* Similarly, in this case, there was no objection to the magis-

2. A petition for a writ of certiorari in *Wong* is currently pending before this Honorable Court.

> trate's selecting the jury. Given this failure to object, we conclude that jury selection by the magistrate does not necessitate the reversal of the appellants' convictions here. *Id.*"

United States v. Vanwort et al, slip op. at 5876-5877.

An examination of the above-quoted excerpt reveals that the panel rejected the petitioners' contention without alluding to the Ninth Circuit's decision in *France* or addressing the claim that the error was jurisdictional.

With leave of the Second Circuit, petitioners DaSilva and Finn joined in Jeanmarie Chapoteau's Suggestion for Rehearing En Banc. On December 6, 1989, the Second Circuit denied the Suggestion for Rehearing En Banc without written opinion. *See* Appendix, *infra.*

REASONS FOR REVIEW

In holding that the Petitioners' mere silence waived their fundamental right to have a district court judge preside over jury selection in their felony trial, the Second Circuit Court of Appeals has rendered a decision in conflict with this Honorable Court's holding in *Gomez v. United States, supra.* The Second Circuit's decision disregards this Court's holding in *Gomez* that the parties cannot confer jurisdiction on a magistrate to conduct jury selection by agreement or even when the parties remain silent on the matter. This fact implicates this Court's Rule 17.1(c), and compels the granting of the instant petition.

Moreover, the decision of the Second Circuit that the Petitioners waived their right to the protection of this Court's holding in *Gomez* by remaining silent after the

district judge opted to delegate jury selection in this matter to the magistrate is in direct conflict with the Ninth Circuit Court of Appeals' decision in *United States v. France,* 886 F.2d 233 (9th Cir. 1989), that the error attendant upon a magistrate presiding over jury selection in a felony trial is not waived by the defendant's failure to object. Given the fact that the First Circuit Court of Appeals has only recently held in *United States v. Lopez-Pena,* ____F.2d____, 46 Cr. L. Rptr. 1234 (December 13, 1989), that the failure to object to a magistrate conducting the voir dire in a felony trial waives any appellate entitlement to this Court's holding in *Gomez,* there is now a distinct and irreconcilable conflict among the courts of appeals. This fact implicates this Court's Rule 17.1(a), and compels the granting of the instant petition.

Finally, the holding of the Second Circuit adds yet another dimension to an issue which has already made its way before this Court in a litany of petitions for writs of certiorari as the courts of appeals struggle to interpret this Court's decision in *Gomez.* While the Second Circuit has purported to distinguish this Court's holding in *Gomez* while in reality emasculating it, it has necessarily "decided an important question of federal law which has not been, but should be settled by this Court." This fact implicates this Court's Rule 17.1(c), and furnishes yet another reason why the instant petition should be granted.

Any of these three reasons provides a compelling basis for this Court to grant the instant Petition for Writ of Certiorari.

ARGUMENT

THE SECOND CIRCUIT COURT OF APPEALS' DECISION THAT THE PETITIONERS' MERE SILENCE WAS TANTAMOUNT TO A KNOWING, VOLUNTARY AND INTELLIGENT WAIVER OF THEIR FUNDAMENTAL RIGHT TO HAVE A DISTRICT JUDGE PRESIDE OVER THEIR FELONY TRIAL IS AT ODDS WITH THIS COURT'S DECISION IN *GOMEZ V. UNITED STATES*, 109 S.CT. 2237 (1989).

A. The Second Circuit's Holding Is At Odds With *Gomez*.

In *Gomez v. United States, supra,* this Court held that a federal district judge may not delegate jury selection to a magistrate inasmuch as the latter does not have jurisdiction to preside in a felony trial, including the jury selection. This Court noted that the absence of a specific reference to jury selection in the Federal Magistrates Act or its legislative history "persuades us that Congress did not intend the additional duties clause to embrace this function." *Id.* at 2247. Rejecting the Government's contention that the error attendant upon the improper delegation of jury selection to a magistrate was harmless, this Court wrote:

> "We find no merit to this argument. Among those basic fair trial rights that 'can never be treated as harmless' is a defendant's 'right to an impartial adjudicator.' Equally basic is a defendant's right to have all critical stages of a criminal trial conducted by a person with jurisdiction to preside. ***Thus, harmless-error analysis does not apply in a felony case in which despite the defendant's objection and***

> *without any meaningful review by a district judge, an officer exceeds his jurisdiction by selecting a jury."*

Id. at 2248 (Citations omitted) (Emphasis added).

It was apparently this Court's allusion to a defendant's objection as being a necessary component to securing relief in the context of a magistrate selecting a jury which resulted in the Second Circuit's cursory treatment of the Petitioners' contention. Yet this Court took great care in framing its holding in *Gomez* on *jurisdictional* grounds in noting that a magistrate's criminal trial *jurisdiction* depends on the defendant's specific, written consent, *id.* at 2245, as well as the above-quoted passage alluding to a defendant's basic right to have jury selection conducted by a person with *jurisdiction* to preside. *Id.* at 2248. It blinks reality to conclude, as the Second Circuit did, that the jurisdictional defect present in the case at bar could somehow be waived by the mere acquiscence of the parties where Congress has expressly withheld the authority of a magistrate to so act.

That the jurisdiction of the federal courts is limited and cannot be enlarged by agreement of the parties is well settled. As this Court noted in *Aldinger v. Howard*, 427 U.S. 1, 15 (1976), federal courts are courts of "limited jurisdiction marked out by Congress." This sentiment is consistent with this Court's holding in *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978), that "The limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded." It follows then that "A judge, who is prohibited from sitting by the plain directions of the law, cannot sit, and the consent that he shall sit gives no jurisdiction." *McClaughry v. Deming*,

186 U.S. 49, 68 (1902) (Failure to object to illegally constituted court martial did not waive appellate complain that tribunal lacked jurisdiction to proceed).

Yet the logic employed by the Second Circuit in their rush to judgment ignores the import of this Court's holding almost ninety years ago that a defendant's failure to voice a timely objection to a tribunal's lack of jurisdiction does not operate to overcome this "plain violation of law." *Id.* at 66. The Petitioners' silence in this case could not, therefore, operate to confer jurisdiction on the magistrate where Congress has unmistakably opted not to do so. *Gomez v. United States, supra,* at 2247-2248. The Second Circuit's wholesale disregard of this Court's jurisdictional analysis in *Gomez* compels the granting of the instant petition.[3]

B. The Second Circuit Erred In Equating The Petitioners' Mere Silence With A Knowing, Voluntary And Intelligent Waiver.

To reach their eventual result, the Second Circuit necessarily equated the Petitioners' mere silence when confronted with the district court's decision to delegate jury selection in this case to the magistrate with that of a knowing, voluntary and intelligent waiver of their significant trial right to have a person conferred with jurisdiction conduct jury selection in a felony trial. Such logic flies in the face of this Court's well-settled standard for waiver of a constitutional right.

At the outset, it is beyond peradventure that before a magistrate may preside over a misdemeanor trial, he:

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3. Inasmuch as the Petitioners' cases were on direct appeal when *Gomez* was decided, the Petitioners are entitled to the retroactive benefit of its holding. *See Griffith v. Kentucky,* 479 U.S. 314 (1987).

> "*shall* carefully explain to the defendant that he has a right to trial, judgment and sentencing by a judge of the district court and that he may have a right to trial by jury before a district judge or magistrate. The magistrate *shall not* proceed to try the case unless the defendant, after such explanation, files a *written consent* to be tried before the magistrate that *specifically waives* trial, judgment, and sentencing by a judge of the district court."

18 U.S.C. § 3401(b) (Emphasis added).

It would appear that the defendant's written consent must be obtained before a magistrate could exercise jurisdiction in a felony trial if this consent was required to permit the latter to preside over a misdemeanor proceeding. Moreover, the procedural safeguards which command the district judge to apprise the defendant of his right to a trial before a district judge would also require the district judge to likewise inform the defendant that he had the right to have a district judge preside over the jury selection in his felony trial.

This record, however, reflects that no such statutory safeguards were followed in the case at bar. Aside from inquiring of the Petitioners whether any of them had any objection to the magistrate conducting the voir dire, the district court's comments were framed in such a way as to suggest that the parties, in essence, had no choice in the matter. Indeed, there is no indication whether any of the Petitioners were apprised that their objection would even result in anyone other than the magistrate conducting voir dire. At the very least, the trial court should have inquired whether the Petitioners wished to state their objections, if any, for the record to crystalize matters for appellate review.

Simply stated, the Petitioners' mere silence is by no means a sufficient basis for any reviewing court to conclude that they wished to knowingly, voluntarily and intelligently waive their "basic" right to have a federal district judge conduct the voir dire in their felony trial. *Gomez v. United States, supra,* at 2248. This contention finds support in the decisions of the several courts of appeals that literal compliance with the Federal Magistrate's Act is necessary to legitimate the defendant's waiver of his right to a trial before a district court and jury. *See e.g., United States v. Marcyes,* 557 F.2d 1361, 1367 (7th Cir. 1977) (Defendant's written consent insufficient absent clear explanation on the record of his right to a jury trial in district court); *United States v. Miller,* 468 F.2d 1041, 1043 (4th Cir. 1972) (Similar holding). In civil cases, the circuit courts have consistently held that a "clear and unambiguous" consent has been required to comply with the Act and give the magistrate jurisdiction. *See e.g., Lovelace v. Dall,* 820 F.2d 223, 225-226 (7th Cir. 1987).

Given this Court's characterization of the defendant's significant trial right to have a person with jurisdiction conduct the voir dire in a felony trial, it stands to reason that the standard of waiver in this regard ought to be that required when a fundamental constitutional right is sought to be waived. As this Court pointed out over fifty years ago in *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938):

> " '[C]ourts indulge every reasonable presumption against waiver' of fundamental constitutional rights and . . . we 'do not presume acquiescence in the loss of fundamental rights.' A waiver is ordinarily

> an intentional relinquishment or abandonment of a known right or privilege."

(Footnotes omitted). These sentiments were echoed by this Court when it noted that waivers of constitutional rights "not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and the likely consequences." *Brady v. Maryland,* 397 U.S. 742, 748 (1970). *See also Boykin v. Alabama,* 395 U.S. 238, 243 (1969) (Guilty plea must be entered knowingly, intelligently and voluntarily to be accepted by the trial judge and waiver will not be presumed from the defendant's silence); *Carnley v. Cochran,* 369 U.S. 506, 516 (1962) (Waiver of defendant's Sixth Amendment rights will not be presumed from a silent record).

With these concepts firmly in mind, it blinks reality to conclude, as the Second Circuit did, that the Petitioners' mere silence when confronted with the district court's decision to delegate jury selection to the magistrate was an intentional relinquishment of a known right attendant upon a critical stage of their felony trial. *Johnson v. Zerbst, supra,* at 464. This record simply does not reflect any evidence that the Petitioners' "waiver" of their right to have a district judge conduct voir dire was intelligent, knowing and voluntary. Defense counsel's failure to object was itself insufficient to comport with either statutory or constitutional waiver requirements and is tantamount to finding waiver from a silent record. If fifty years of precedent from this Court mean anything at all, the Second Circuit erred in making just such a finding.

The Second Circuit's holding in this regard provides yet another justification for this Honorable Court to grant this petition for writ of certiorari.

C. The Second Circuit's Holding Is In Conflict With The Ninth Circuit's Holding In *United States v. France.*

Although the Petitioners apprised the Second Circuit of the Ninth Circuit Court of Appeals' decision in *United States v. France,* 886 F.2d 233 (9th Cir. 1989), the Second Circuit did not feel it necessary to refer to or distinguish its holding in rejecting the Petitioners' contention. In *France,* the Ninth Circuit acknowledged this Court's jurisdictional basis for its holding in *Gomez* in holding that a defendant's failure to object to the magistrate conducting jury selection did not operate as a bar to appellate relief. Rejecting the very argument advanced by the Second Circuit in the instant case, the Ninth Circuit held that:

> ". . . [W]e find absolutely no indication in the tenor or the text of the [*Gomez*] opinion to suggest that the Court relied on, or did more than note—in the interest of providing a full and accurate description of the facts before it—the fact the petitioners had objected to the magistrate's conducting voir dire. The snippet recited above merely recapitulates the facts of the case as a descriptive matter. *We do not think the passage can reasonably be read to suggest that the Court intended to limit the broad, definitive rule it announced to the precise facts before it.*"

United States v. France, supra, at 227. (Emphasis added).

Simply stated, the Ninth Circuit unanimously held that this Court's holding in *Gomez* requires reversal of all convictions in cases then pending on direct appeal in which a magistrate presided over jury selection in a felony trial, regardless of whether the defendant objected

in the district court to the improper delegation of jury selection to the magistrate. While obviously free to disregard the reasoning employed by its sister court, the Second Circuit should have at least noted the Ninth Circuit's decision in passing or at least made a good-faith attempt at distinguishing its holding.

It is worthy of note that at least one district court has concluded that this Court's holding in *Gomez* prohibits a magistrate from conducting jury selection even with a defendant's consent. In *United States v. Baron,* 721 F.Supp. 259 (D. Hawaii 1989), the court set aside a conviction on collateral attack even in the absence of a contemporaneous objection. *Compare United States v. Rubio,* 722 F.Supp. 77 (D. Del. 1989) (*Gomez* not to be applied retroactively on collateral attack in the absence of objection at trial or on direct appeal).

To add to the conflict among the circuits, the First Circuit Court of Appeals has only recently held in *United States v. Lopez-Pena,* ____F.2d____, 46 Cr. L. Rptr. 1234 (December 13, 1989), that a defendant's failure to voice a contemporaneous trial objection to the magistrate conducting voir dire or to otherwise show that this improper delegation affected the fairness, integrity, or public reputation of their trial compels the denial of appellate relief.

Yet even this decision was not reached without dissent. In speaking to the defendants' failure to voice objection to the magistrate conducting voir dire, Judge Aldrich pointed out that he could not agree with the majority's finding that there was no valid reason for defense counsel to believe that timely objection would have been futile. Referring to this Court's unanimous language in *Gomez* as "positive and strong," Judge Aldrich agreed with the

Ninth Circuit's holding in *France* that this Court's language was not to be diminished by the fact that this Court noted that there had been no trial objection lodged. *United States v. Lopez-Pena, supra,* at 1235.

That Judge Aldrich's reasoning is equally applicable to the failure of the Petitioners to object below is at once evident and supplies yet an additional reason why the decision of the Second Circuit is seriously flawed. The only way that order can be made of the chaos that now exists among the circuit courts attempting to wrestle with the parameters of this Court's decision in *Gomez* is for this Court to grant the instant petition for writ of certiorari.

CONCLUSION

For all of the foregoing reasons, the Petitioner respectfully submits that this Honorable Court should grant this Petition for Certiorari and reverse the judgment of the Second Circuit Court of Appeals.

Respectfully submitted,

DON ERVIN
Counsel of Record
1018 Preston
Seventh Floor
Houston, Texas 77002
(713) 223-1622

BRIAN WICE
3500 Travis
Houston, Texas 77002
(713) 524-9922

Counsel for Petitioner
Pedro DaSilva

JULIANE BALLIRO
BALLIRO, MONDANO
& BALLIRO, P.C.
3 Arlington Street
Boston, Massachusetts 02116
(617) 227-5822

Counsel for Petitioner
Steven Finn

APPENDIX A

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 6th, day of November one thousand nine hundred and eighty-nine.

Docket Nos. 88-1221, 88-1222, 88-1223, 88-1227

UNITED STATES OF AMERICA,
Appellee

v.

AART VANWORT, WALTER CABRAL, JEAN-MARIE CHAPOTEAU, VINCENT CICALI, MICHAEL CROWN, ALEXANDER DONCHENKO, BRUCE DUIGNAN, DANIEL DYMENSTEIN-KREMER, RICHARD KEIM, RICHARD HOPKINS, TEMISTOCLES MOURA-TORRES, CLAUDIO PETENUCCI, GESSI PRADO, HENRIQUE RAJS, ANTHONY RUOTOLO, SERGIO STOFEL de CASTRO, NAHID TABIBI, CHRISTIANUS VANWORT, EDUARDO VARITZO, MICHAEL ZACHARIAS, PEDRO DaSILVA, ALFRED DONCHENKO, ALEXANDER FONTANELLE, STEVEN J. FINN,
Defendants,

JEANMARIE CHAPOTEAU, MICHAEL CROWN, PEDRO DaSILVA, STEVEN M. FINN, BRUCE DUIGNAN, VINCENT CICALI,
Defendants-Appellants.

(Filed December 6, 1989)

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Appellants JEANMARIE CHAPOTEAU and MICHAEL CROWN.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Elaine B. Goldsmith
Clerk

by /s/ TINA EVE BRIE
Chief Deputy Clerk